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No. 91-83

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

ANA LUCIA HODGE, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the Equal Access to Justice Act, 5 U.S.C. 504 and 28 U.S.C. 2412(d), authorizes the award of attorney's fees for work performed in connection with administrative deportation proceedings conducted by the Immigration and Naturalization Service.

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OPINIONS BELOW

The opinion of the court of appeals in *Hodge* v. *United States Department of Justice* (Pet. App. A1-A12) is reported at 929 F.2d 153. The opinion of the Board of Immigration Appeals in that case (Pet. App. A13-A15) is unreported.

The opinion of the court of appeals in *Escobedo-Gonzalez* v. *INS* (Pet. App. A21-A22) is unreported, as is the opinion of the Board of Immigration Appeals (Pet. App. A23-A25) in that case.

The opinion of the court of appeals in *Amador-Castillo* v. *INS* (Pet. App. A28-A30), is unreported, as is the opinion of the Board of Immigration Appeals (Pet. App. A31-A33) in that case.

JURISDICTION

The judgments of the court of appeals in *Hodge* and *Amador-Castillo* were entered on April 4, 1991, and the judgment in *Escobedo-Gonzalez* was entered on April 22, 1991. The petition for a writ of certiorari, including all three cases, was filed on July 2, 1991. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are three individuals who prevailed in individual administrative deportation proceedings; each thereafter sought an award of attorney's fees under EAJA for his attorney's work in those proceedings. In each case, an immigration judge denied the fee request, and the Board of Immigration Appeals affirmed. Pet. App. A13, A23, A31-A32.

Each petitioner thereafter sought review by the Fifth Circuit of the denial of EAJA fees. In *Hodge*, the lead case, the court of appeals issued an opinion holding that EAJA does not apply to administrative deportation proceedings. Pet. App. A1-A11. The panel noted the "overwhelming judicial authority" contrary to petitioner's position (*id.* at A7), and aligned itself with that authority.[1] Judge Goldberg dissented. *Id.* at A11-A12.

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[1] The court of appeals noted that while the Ninth Circuit has held (in *Escobar-Ruiz* v. *INS*, 838 F.2d 1020 (1988)) that EAJA applies to INS administrative proceedings since they are similar to those governed by the Administrative

The same panel decided *Amador-Castillo* on the same date, on the basis of *Hodge*; Judge Goldberg again dissented. Pet. App. A28-A30. Shortly thereafter, a different panel relied on *Hodge* in denying the petition for review in *Escobar-Gonzalez*. *Id.* at A21-A22.

ARGUMENT

As petitioners acknowledge (Pet. 15-16, 20), their petition raises the same issue that is before the Court in *Ardestani* v. *INS*, cert. granted, No. 90-1141 (Mar. 4, 1991). *Ardestani* has been fully briefed in this Court, and is scheduled for oral argument on October 8, 1991. Accordingly, the instant petition should be held pending the Court's decision in *Ardestani*, and should then be disposed of in light of that decision.

Contrary to petitioners' suggestion, there is no reason for the Court to grant plenary review in the instant case. Although petitioners state that they have raised "additional arguments" (Pet. 20), their arguments are not significantly different from the argu-

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Procedure Act, four other circuits have concluded that EAJA extends only to administrative proceedings which—unlike those conducted by the INS—are subject to the APA. Pet. App. A4-A6, citing *Clarke* v. *INS*, 904 F.2d 172 (3d Cir. 1990); *Ardestani* v. *INS*, 904 F.2d 1505 (11th Cir. 1990), cert. granted, No. 90-1141 (Mar. 4, 1991); *St. Louis Fuel & Supply Co.* v. *FERC*, 890 F.2d 446 (D.C. Cir. 1989); and *Owens* v. *Brock*, 860 F.2d 1363 (6th Cir. 1988). Two more circuits have since joined the majority view, concluding that EAJA fees are not available for work performed in INS deportation proceedings. *Escobar* v. *INS*, 935 F.2d 650 (4th Cir. 1991); *Hashim* v. *INS*, 936 F.2d 711 (2d Cir. 1991).

ments of petitioner and amici in *Ardestani*.[2] Thus, there is no reason for the Court to depart from its customary practice of holding subsequent petitions for certiorari raising issues identical to those already pending on writ of certiorari, and then disposing of the subsequent petitions as appropriate in light of the decision in the case pending on writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Ardestani* v. *INS*, No. 90-1141, and thereafter disposed of as appropriate in light of that decision.

Respectfully submitted.

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[2] We have addressed those arguments in our brief in *Ardestani*, a copy of which we are supplying to counsel for petitioners.

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